

As Received Electronically

October 31, 2001

VIA HAND DELIVERY

**Mr. Michael Jordan, Chairperson
Indiana Water Pollution Control Board
c/o Indiana Department of Environmental Management
Attn: Ms. Betsy Rouse, Office of Water Quality
Indiana Government Center North, 12th Floor
100 N. Senate Avenue
Indianapolis, IN 46204**

RE: Proposal for Adoption of a Rule Concerning Proposed Water Quality Standards for Wetlands and 401 Certification Procedures

Dear Mr. Jordan:

Enclosed on behalf of the Coalition on Wetland Issues (Coalition) is a proposed rule proposal for consideration by the Indiana Water Pollution Control Board (Board) pursuant to IC 13-14-8-5 (the Rule Proposal). The Coalition comprises the following entities: American Electric Power, Bethlehem Steel Corporation, Hoosier Energy, Indiana Builders Association, Indiana Coal Council, Vectren, and Waste Management of Indiana, LLC.

The Rule Proposal addresses the establishment of water quality standards for wetlands and for establishment of procedures and criteria for certifications requested under Section 401 of the Clean Water Act. The Rule Proposal is attached to a petition signed by 202 persons, which petition is also enclosed with original signatures.

Reasons for the Rule Proposal include, though are not limited to, the following:

- (1) Water quality standards are proposed to provide reasonable and adequate protection of Indiana s wetlands which are subject to the requirements of the Clean Water Act.
- (2) The proposed standards included in the Rule Proposal are intended to fulfill the Board s responsibilities for adoption of water quality standards under Section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c). In view of the limitations on the Board s authority under IC 13-18-3-2(1) and the ramifications of the recent decision of the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675 (2001), the scope of applicability of the proposed standards is limited to those waters of the state which are also waters of the United States.

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- (3) The designated uses and water quality criteria in the Rule Proposal are intended to recognize the variability of uses which individual wetlands are capable of providing and to further recognize the natural variability in water quality which is characteristic of wetlands waters.
- (4) The Rule Proposal does not attempt to regulate hydrologic characteristics of a wetland since such subjects are believed outside the authority of the Board.
- (5) The antidegradation provisions of the Rule Proposal are cognizant of the full range of discharges, including but not limited to dredge and fill discharges, which may be made to wetlands.
- (6) The 401 certification provisions of the Rule Proposal are intended to be reasonable, easily implemented, and conducive of consistent decisionmaking, while avoiding redundancy with permitting requirements under section 404 of the Clean Water Act, 33 U.S.C. 1344, concerning activities with proposed discharges of dredged or fill materials.
- (7) The definition of waters of the United States is proposed to recognize the limitations on the Corps regulatory definition imposed through the recent decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675 (2001).
- (8) To ease the implementation of the 401 certification process, it is proposed to provide categorical waivers of certification for any 404 project governed by a general permit of the Corps of Engineers, unless the wetland waters in question were outstanding state resource waters or outstanding national resource waters.
- (9) The proposed 401 certification provisions recognize that the certification requirement is triggered by an application for any federal permit which may result in a discharge to navigable waters and is not restricted to applications for dredge and fill permits under section 404 of the Clean Water Act.
- (10) With respect to applications for 404 permits, the 401 certification provisions of the Rule Proposal would require the applicant to satisfy the compensatory mitigation requirements of the Corps of Engineers under the 404 permit process.

The Board's consideration of and action upon the Rule Proposal is respectfully requested on behalf of the Coalition. Please feel free to contact the undersigned with any questions.

Very truly yours,

Larry J. Kane
Attorney for the Coalition

Enclosures

cc: Mr. Tim Method, Deputy Commissioner, IDEM